A **FADZIL HARUN**

v.

MOHD AZRUL MD ARIFFIN & ANOR

B COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: C-04-79-03-2014]
19 JANUARY 2015

C

TORT: *Negligence – Road accident – Collision between motorcar and motorcycle – Sessions Court finding that motorcycle rider was 70% liable while motorcar driver was 30% liable towards pillion rider – Joint tortfeasor – Whether motorcar driver could claim 70% contribution of damages from motorcycle rider – Civil Law Act* D *1956, s. 10(1)(c)*

ROAD TRAFFIC: *Pillion riding – Collision between motorcar and motorcycle – Sessions Court's finding that motorcycle rider was 70% liable and car driver was 30% liable towards pillion rider – Joint tortfeasor – Whether motorcar driver could claim 70% contribution of damages from motorcycle rider*

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DAMAGES: *Apportionment – Joint tortfeasors – Sessions Court finding that motorcycle rider was 70% liable and car driver was 30% liable towards pillion rider – Joint tortfeasor – Whether motorcar driver could claim 70% contribution of damages from motorcycle rider*

F The first respondent and second respondents filed a claim for damages which arose out of a road accident between the first respondent's motorcycle and the appellant's motorcar. The first respondent was the rider of the motorcycle and the second respondent was the pillion rider. The finding of liability stemmed from the ruling of the Sessions Court that the first G respondent was 70% liable to the second respondent and that the appellant was 30% liable. The appellant filed a counterclaim pursuant to s. 10(1)(c) of the Civil Law Act 1956 but the Sessions Court Judge dismissed the counterclaim. The High Court Judge ('HCJ') also dismissed the appellant's appeal. Hence, the present appeal. The appellant appealed against the refusal of the HCJ to allow a plea of contribution or indemnity wherein the appellant H sought 70% contribution in term of damages that the appellant had to pay out to the second respondent from the first plaintiff.

Held (allowing appeal with costs)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

I **(1)** This was not a claim for apportionment of liability but a claim for contribution from the first respondent who was a joint tortfeasor. The appellant was entitled to pursue its right of contribution or indemnity

against the first respondent up to 70% of damages awarded against the second respondent. The quantum of damages was not in dispute. Therefore, the judge had erred in dismissing the counterclaim of the appellant. In a case of an action of contribution, the appellant was entitled to rely on the quantum of damages already assessed and not in dispute and proceed to claim for contribution based on the ratio of liability already ordered by the court. (paras 7 & 9)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama dan kedua telah memfailkan tuntutan untuk ganti rugi yang berbangkit daripada kemalangan jalan raya antara motosikal responden pertama dan kereta perayu. Responden pertama adalah penunggang motosikal dan responden kedua adalah pembonceng motosikal. Dapatan liabiliti berpunca daripada keputusan Mahkamah Sesyen bahawa responden pertama bertanggungan sebanyak 70% terhadap responden kedua dan perayu adalah bertangungan sebanyak 30%. Perayu telah memfailkan tuntutan balas menurut s. 10(1)(c) Akta Undang-Undang Sivil 1956 tetapi Hakim Mahkamah Sesyen telah menolak tuntutan balas tersebut. Hakim Mahkamah Tinggi ('HMT') juga telah menolak rayuan perayu. Oleh itu, rayuan ini. Perayu merayu terhadap keengganan HMK untuk membenarkan rayuan pli sumbangan atau tanggung rugi di mana perayu memohon sumbangan 70% dari segi kerosakan yang terpaksa dibayar oleh perayu kepada responden kedua daripada plaintif pertama.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Ini bukanlah suatu tuntutan untuk pembahagian liabiliti tetapi tuntutan untuk sumbangan daripada responden pertama yang merupakan pelaku tort bersama. Perayu berhak menuntut sumbangan atau tanggung rugi terhadap responden pertama sehingga 70% ganti rugi yang diawardkan terhadap responden kedua. Jumlah ganti rugi tidak dipertikaikan, oleh itu, hakim telah terkhilaf dalam menolak tuntutan balas perayu. Dalam kes tindakan sumbangan, perayu berhak untuk bergantung kepada kuantum ganti rugi yang telah dinilai dan tidak dipertikaikan dan meneruskan tuntutan sumbangan berdasarkan nisbah tanggungan yang telah diperintahkan oleh mahkamah.

Case(s) referred to:
Chan Kit Hong & Anor v. Jayakumar M Kuppusamy & Anor [1985] 1 CLJ 127; [1985] CLJ (Rep) 55 FC ***(refd)***
Malaysia National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 10(1)(c)
Rules of the High Court 1980, O. 16 r. 8(1)(a)

A *For the appellant - Jagjit Singh; M/s Jagjit Singh & Co*
For the respondent - Harinder Singh; M/s Ravi Moorthi Noriza Mala & Partners

[Editor's note: Appeal from High Court, Kuantan; Civil Appeal No: 12-130-2009 (overruled).]

Reported by Sandra Gabriel

B

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] This is an appeal by the appellant against the decision of the High Court dismissing the appellant's appeal on 5 October 2011. For ease of reference, we will refer to the appellant as the defendant and the first and second respondents as the first and second plaintiffs.

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Brief Facts Relevant To This Appeal

[2] The first and second plaintiffs filed a claim for damages arising from a road accident which occurred on 8 April 2002 at KM196.5 Jalan Johor Bahru-Kuantan between the first plaintiff's motorcycle Registration No. CAH 4370 and the defendant's motorcar Registration No. BDR 9715. The first plaintiff was the rider of the motorcycle and the second plaintiff was seated as the pillion rider. The defendant was the driver of the motorcar.

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[3] The defendant filed an amended defence and counterclaim against the first plaintiff and *inter alia* sought to counterclaim from the first plaintiff the damages to the extent of the first plaintiff's contribution in the accident payable to the second plaintiff who was the pillion rider. After a full trial, the learned Sessions Court Judge decided and apportioned liability as follows:

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(i) The first plaintiff – 70% liability; and

(ii) The defendant – 30% liability to the second plaintiff.

[4] The defendant had filed a counterclaim based on s. 10 and in particular sub-s. 10(1)(c) of the Civil Law Act 1956 (Act 67) and the learned Sessions Court Judge dismissed the counterclaim of the defendant. The learned High Court Judge on 5 October 2011 also dismissed the defendant's appeal (See the order at pp. 4-5 appeal record part A). Hence, the defendant filed this appeal.

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[5] The defendant has abandoned its grounds of appeal in the memorandum of appeal (see at pp. 1-3 appeal record part A), save and except for grounds 1 and 2 which are essentially on the dismissal of the counterclaim. The defendant adopted the procedure set out in O. 16 r. 8(1)(a) of Rules of the High Court 1980 to claim a contribution and/or indemnity against the 1st plaintiff. This procedure had been set out in the case of *Chan Kit Hong & Anor v. Jayakumar M Kuppusamy & Anor* [1985] 1 CLJ 127; [1985] CLJ (Rep) 55; [1984] 2 MLJ 271.

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[6] The finding of liability in this case stemmed from the ruling of the Sessions Court that the first plaintiff was 70% liable to the second plaintiff and the defendant was 30% liable. The defendant now appeals against the refusal of the High Court Judge to allow a plea of contribution or indemnity wherein the defendant seeks 70% contribution in term of damages that the defendant has to pay out to the second plaintiff from the first plaintiff.

[7] This is not a claim for apportionment of liability but a claim for contribution from the first plaintiff who is a joint tortfeasor. We now set out s. 10 of the (Act 67) in full:

> 10 (1) Where damage is suffered by any person as a result of a tort (whether a crime or not):
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> (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the damage;
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> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgements given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgement first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action;
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> *(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section form any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.*
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> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
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> (3) For the purpose of this section:
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> (a) the expressions "parent" and "child" have the same meaning as they have for the purpose of section 7; and

A (b) the reference in paragraph (1)(b) to "the judgement first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal be construed as a reference to that judgement as so varied.

B (4) Nothing in this section shall:

(a) affect any criminal proceedings against any person in respect of any wrongful act; or

(b) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been enacted. C (emphasis added).

[8] The court also refers to the decision of Supreme Court in the case of *Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351; [1997] 2 MLJ 165 in which the facts of the case are very similar to ours. We refer to the judgment of His Lordship Edgar Joseph Jr at p. 379 (CLJ); pp. 188-D 189 (MLJ) of the report which we now set out:

> Bearing in mind what has just been said, it will be seen that sub-ss (1) and (2) of s 10 of the CLA are concerned with the reformation of procedural law in proceedings against and contribution between joint or several tortfeasors and it is difficult to see what relevance they have to E the question of the extent of the liability of insurers against third party risks which is an entirely separate issue depending upon the construction of the relevant compulsory third party insurance legislation and the terms of the relevant contract of insurance. In so far as third party liability under the Ordinance is concerned, injured third parties in seeking to enforce satisfaction of a judgment obtained against insurers by virtue of s 80(1) F of the Ordinance will not be affected by any order as to apportionment of responsibility between tortfeasors, whether joint or independent. *However, if a tortfeasor is called upon to pay the full amount in the first instance, his insurer will, of course pay the full amount but his insurer will be subrogated to his right of contribution and should be left ultimately only bearing his due proportion.* (emphasis added).

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[9] In the light of that, it is our finding that the defendant in this case is entitled to pursue its rights of contribution or indemnity against the first plaintiff up to 70% of damages awarded against the second plaintiff. The quantum of damages is not being disputed, we therefore are of the view the learned judge erred in law in dismissing the counterclaim of the defendant. H In a case of an action of contribution, the appellant is entitled to rely on the quantum of damages already assessed and not in dispute and proceed to claim for contribution based on the ratio of liability already ordered by the court. There would be no necessity for any evidence to be led in this regard.

I **[10]** In the upshot, the appeal is allowed purely in relation to grounds first and second of the memorandum of appeal and the order by the High Court is set aside to that extent with costs.